168

No. 09-1567

AUG 10 2010

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES D. LEE,

Petitioner,

— v. —

ASTORIA GENERATING COMPANY, L.P., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

REPLY BRIEF

PAUL THOMAS HOFMANN
HOFMANN & SCHWEITZER
360 West 31st Street
New York, New York 10001
(212) 465-8840
paulhofmann@hofmannlawfirm.com

Counsel for Petitioner

COUNSEL PRESS
(800) 274-3321 (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

POINT I — CONFLICT EXISTS AMONG THE CIRCUITS ON WHAT IS THE PROPER TEST FOR VESSEL STATUS 1

POINT II — THE COURT OF APPEALS ERRED IN FINDING MARITIME JURISDICTION OVER PETITIONER'S TORT CLAIM AGAINST THE LAND-BASED POWER PLANT OWNER 3

POINT III — RESPONDENTS IGNORE THE SUPREME COURT'S DIRECTIVES ON HOW TO DETERMINE VESSEL STATUS 9

POINT IV — THE *CAMMON* CASE IS GOOD LAW AS THE MARITIME BUT LOCAL DOCTRINE PROHIBITS FEDERAL MARITIME LAW PREEMPTION OF SAFETY REGULATIONS PROTECTING NEW YORK CONSTRUCTION WORKERS 11

POINT V THE NEW YORK COURTS WRONGLY REFUSED TO APPLY *SCINDIA* TO THE PETITIONER'S CLAIMS 13

CONCLUSION 14

TABLE OF AUTHORITIES

Cases: *Page(s)*

Anaya v. Traylor Brothers, Inc.,
478 F.3d 251 (5th Cir. 2007) 3, 4

Belle of Orleans,
535 F.3d 1299 (11th Cir. 2008) 1, 2

Cammon v. City of New York,
95 N.Y.2d 583 (2000), *reary. denied*,
96 N.Y.2d 793 (2001) 10, 11, 12

Cooley v. Board of Port Wardens,
53 U.S. (12 How.) 299 (1852) 13

Cope v. Vallette Dry-Dock Co.,
119 U.S. 625 (1887) 10

De La Rosa v. St. Charles Gaming Co.,
474 F.3d 185 (5th Cir. 2006) 1, 2

Director, OWCP v. Perini North River Associates,
459 U.S. 297 (1983) 3

Evansville & Bowling Green Packet Co. v.
Chero Cola Bottling Co.,
271 U.S. 19 (1926) 1, 9-10

Foster v. Peddicord,
826 F.2d 1370 (4th Cir. 1987), *cert. denied*,
484 U.S. 1027 (1988) 7

Grant Smith-Porter Ship Co. v. Rohde,
257 U.S. 469 (1922) 11, 12

H20 Houseboat Vacations, Inc. v. Hernandez,
103 F.3d 914 (9th Cir. 1996) 7

Howard v. S. Ill. Riverboat Casino Cruises, Inc.,
364 F.3d 854 (7th Cir. 2004) 1

Huron Portland Cement Co. v. City of Detroit,
362 U.S. 440 (1960) 13

In Re: Katrina Canal Breaches Litigation,
324 Fed. Appx. 370, 2009 U.S. App. Lexis 9342
(5th Cir. 2009) 8

*Jerome B. Grubart, Inc. v.
Great Lakes Dredge & Dock Co.*,
513 U.S. 527 (1995) ..... *passim*

Kathriner v. Unisea, Inc.,
975 F.2d 657 (9th Cir. 1992) 10

Kernan v. American Dredging Co.,
355 U.S. 426 (1958) 11

Pavone v. Mississippi Riverboat Amusement Corp.,
52 F.3d 560 (5th Cir 1995) 1, 2, 10

Robins Dry Dock and Repair Co. v. Dahl,
266 U.S. 449 (1925) 12

Roper v. United States,
368 U.S. 20 (1961) 10

Scindia Steam Navigation Co. v. De Los Santos,
451 U.S. 156 (1981) 12, 13

Sisson v. Ruby,
497 U.S. 358 (1990) 7, 9

Stewart v. Dutra Construction,
543 U.S. 481 (2005) 1, 2, 9

Texaco Exploration & Prod. v.
Amclyde Engineered Prods.,
448 F.3d 760 (5th Cir. 2006) 8

Victory Carriers v. Law,
404 U.S. 202 (1972) 5

Watson v. Indiana Gaming Co., Inc.,
337 F. Supp. 2d 951 (E.D. Ky. 2004) 5, 6

West v. United States,
361 U.S. 118 (1959) 10

Yamaha Motor Corporation v. Calhoun,
516 U.S. 199 (1996) 12

Statutes:

1 U.S.C. § 3 1

33 U.S.C. § 901 4

33 U.S.C. § 905(b) 3, 11

Labor Law § 240 12

Preliminarily, respondents concede that the structure involved here has not moved for 41 years, except for painting of its steel bottom in a dry dock about once a decade. Since painting cannot be done under water, the hull has to be floated to and placed in a dry dock. That movement does not constitute navigation in any true sense. *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926) (structure not vessel in navigation regardless of fact each winter boat was towed to a protected harbor). This strongly suggests the structure here is not a vessel in navigation.

POINT I CONFLICT EXISTS AMONG THE CIRCUITS ON WHAT IS THE PROPER TEST FOR VESSEL STATUS

Respondents recognize that there is a conflict among the various Circuits on the issue of what constitutes a vessel when that structure is essentially permanently moored and is servicing a land-based commercial enterprise. *Cf. Belle of Orleans*, 535 F.3d 1299 (11th Cir. 2008), *Pavone v Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir 1995), *De La Rosa v St. Charles Gaming Co.*, 474 F.3d 185 (5th Cir 2006) and *Howard v. S. Ill. Riverboat Casino Cruises, Inc.*, 364 F.3d 854 (7th Cir. 2004).

Respondents suggest the conflict is irrelevant because casino boats should be considered *sui generis* from other floating structures. However, 1 U.S.C. § 3 makes no distinction for casino boats, so their status, like all other structures, is ruled by the Supreme Court's *Stewart* decision, and others, which need

clarification for determining which structures shall be considered to be vessels in navigation or simply land-based structures. Resolving that conflict by a grant of certiorari is important because the energy barge in issue, using the general contours of the *De La Rosa* and *Pavone* analysis, would fail the test for a vessel in navigation, while applying the *Belle of Orleans* analysis might lead to a different result. Since the casino boat cases informed the reasoning of *Stewart v. Dutra Construction*, 543 U.S. 481 (2005) (referencing *Pavone*) and the Appellate Division decision (citing *Pavone* and *De La Rosa)* resolution of the conflict in the casino boat cases is relevant.

The Maritime Law Association ("MLA") also is of the opinion, as stated in its motion seeking to submit an *amicus* brief, that a significant conflict exists among the Circuits.[1]

---

[1] MLA defines the primary question to be whether an owner's intention for the structure's use should be considered as a factor in determining vessel status. Petitioner asserts that this is insufficient, and contends that the extent of use of the vessel as a means of maritime transportation in the past, as well as proposed, are also relevant.

POINT II THE COURT OF APPEALS ERRED IN FINDING MARITIME JURISDICTION OVER PETITIONER'S TORT CLAIM AGAINST THE LAND-BASED POWER PLANT OWNER

The Court of Appeals made reversible error on a significant issue of federal maritime law in finding that petitioner's claim against the power plant owner was covered by maritime law, not state law. If the Court here agrees that maritime jurisdiction was absent, then state law applies to the claims, which would moot the issue because § 905(b) would not be involved.[2]

Anaya v. Traylor Brothers, Inc., 478 F.3d 251 (5th Cir. 2007), cited by respondents, exemplifies the distinction. That case did not involve a determination of whether there was general maritime jurisdiction

---

[2] Respondents confuse the statutory grant of jurisdiction in LHWCA with the general maritime law jurisdiction where they assert that petitioner takes an inconsistent position here by arguing that no maritime jurisdiction applies to his tort claim, even though he obtained LHWCA benefits. The jurisdictional requirements of each are different. Before the ALJ, in seeking LHWCA benefits, claimant contended that "[t]he sole issue here is whether Barge #1 *was on navigable waters* at the time of the accident", a showing which would bring his compensation claim under the purview of LHWCA, *Director, OWCP v. Perini.North River Associates*, 459 U.S. 297 (1983). Petitioner never contended that the claim met other requirements to support general maritime law jurisdiction.

under *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995) but whether there was Longshore and Harbor Compensation Act, 33 U.S.C. § 901 et seq. ("LHWCA") or state workers compensation jurisdiction over an injured employee's workers compensation claim. *Anaya*, at 478 F.3d 254, explains:

> To receive benefits under the LHWCA, a worker must satisfy both *a situs* and status test. The situs test concerns geographic areas *covered by the LWHCA*, whereas the status test concerns an employee's type of work activities. The situs test includes injuries "occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." The status test defines an employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker." (citations omitted).

Under the general maritime law, although the situs test is similar, that the injury occur on the navigable waters, the status test is much different. As *Grubart* explains, the status test under the general

maritime law requires that the tort have a connection to a maritime activity, 513 U.S. at 534, failing that, state law applies. *Victory Carriers v. Law*, 404 U.S. 202 (1972).

Watson v. Indiana Gaming Co., Inc., 337 F. Supp. 2d 951 (E.D. Ky. 2004) explains:

> The Supreme Court has held that a party seeking to invoke federal admiralty jurisdiction over a tort claim must satisfy conditions both of location and of connection with maritime activity. The "locality" prong requires that the alleged tort must have occurred on navigable water... As to the second "connection" factor, the Court has established a two-part inquiry. First, the court must assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce. Next, the court must examine the general conduct from which the incident arose to determine whether there is a "substantial relationship" between the activity giving rise to the incident and traditional maritime activity. "If the tort produces no potential threat to maritime commerce or occurs during activity lacking a substantial relationship to traditional maritime activity, *Sisson* assumes that the objectives of admiralty jurisdiction probably do not require its

> exercise, even if the location test is satisfied." *(citations omitted).*

337 F. Supp. 2d 455.

A. Maritime Jurisdiction is Absent Because No Vessel In Navigation Involved, Nor Was a Traditional Maritime Activity Involved

Respondents misleadingly describe the general characteristics of the work Mr. Lee performed as vessel repair, by analogizing it to installing a ship's generator or elevator. It was not. Mr. Lee was overhauling power plant generators, that for convenience sake were situated on floating platforms, he was not repairing vessel equipment. The turbines did not produce power for the barge. As respondents conceded below, "[p]laintiff's work did not affect the structural integrity of the barge, and his work on the turbine did not affect 'an integral part of the barge's structure'". (Respondents' Statement to the Court of Appeals).

As the Appellate Division noted:

> Moreover, the turbine facility, whose sole purpose is to provide electrical power to these neighborhoods, is permanently moored, serves no ancillary maritime purpose, and was not intended to operate as a vessel in navigation. The facility receives its utilities from shore, and as noted, provides power via lines that run from the barge to the Con Ed substation. The facility is not self-propelled, and was designed and

> intended to be a power plant, not a means of water transportation or maritime commerce.

Appendix B, 31a.

Mr. Lee's claim lacks maritime jurisdiction because it fails to fulfill the status requirement under the *Grubart/Sisson* test for maritime jurisdiction. First, it fails the 'potentially disruptive impact' threat posed to maritime commerce factor. That threat must be more than mere speculation, and must be tied in some part to the incident leading to the injury. *H20 Houseboat Vacations, Inc. v. Hernandez*, 103 F.3d 914, 917 (9th Cir. 1996). In the present case, no disruption to maritime commerce reasonably could be expected from a fall inside the exhaust well of the turbine, which is fully contained in the factory structure above the platform. A worker injured in such manner would walk or be carried off of the platform via the boarding ramp leading to the pier, which has happened, or could have happened, for the past 41 years.

Petitioner's tort claim also fails the second prong of the "status" requirement because what he was doing at the time did not constitute a traditional maritime activity. *Foster v. Peddicord*, 826 F.2d 1370 (4th Cir. 1987), *cert denied*, 484 U.S. 1027 (1988) (recreational swimming not a traditional maritime activity).

The Supreme Court states that the maritime activity test is fulfilled when "a tortfeasor's activity, commercial or noncommercial, on navigable waters is

so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the case at hand." *Grubart*, 513 U.S. at 539-40.

Instructive is *Texaco Exploration & Prod. v. Amclyde Engineered Prods.*, 448 F.3d 760 (5th Cir. 2006) where the court analyzed whether claims arising from a construction accident were covered by maritime law, when a component of a crane situated on a barge failed, causing a load to fall and damage a platform structure under construction in the Gulf of Mexico on what is considered in law "on land" because it was covered by the Outer Continental Shelf Lands Act, ("OCSLA"). The activities surrounding the development at the platform were covered by OCSLA, and looking at the general contours of the work in progress, the court held it was not covered by maritime law.

Similarly, in *In Re: Katrina Canal Breaches Litigation*, 2009 U.S. App. Lexis 9342 (5th Cir. 2009), maritime jurisdiction was found lacking over claims that a dredging company, through the use of a barge mounted crane, had negligently cleared a canal which failed during Hurricane Katrina. The court found that "the improvement project implicated only local, land-based interests, and the connection, if any, to admiralty law is "wholly fortuitous"... To the extent that Defendants' dredging implicates connection to maritime law, that connection is overshadowed greatly by the canal project's connection to the local interest of drainage and flood-prevention." *Id.* at *26.

In sum, Elliot's renovation of Orion's turbines did not constitute an activity bearing a substantial relationship to a traditional maritime activity. It simply was a construction project, renovating turbines, performed for the benefit of a land-based enterprise, the electric grid network distribution plant which supplied electric power to Queens and Brooklyn. There was nothing 'maritime' about the operation of that facility, or the work plaintiff performed. The turbines were removed from the Brooklyn site and sent to a factory in Pennsylvania for refurbishing. The turbine for the energy plant was being overhauled, not the floating platform upon which it fortuitously was located. Accordingly, both elements of the "maritime activity" prong of the *Grubart/Sisson* test are lacking here, in addition to the failure to fulfill the maritime location/situs requirement (because the structure did not constitute a vessel in navigation), accordingly, there is no maritime jurisdiction over this claim.

POINT III RESPONDENTS IGNORE THE SUPREME COURT'S DIRECTIVES ON HOW TO DETERMINE VESSEL STATUS

The Supreme Court's decision in *Stewart* explained how to apply the practically capable of being used as a means of transportation test through the incorporated precedents to which it cited, and the principles for which those cases stand. There are similar characteristics between the structures in those cases and the power plant involved here, which similarities respondents ignore. *See, Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*,

271 U.S. 19 (1926) (floating wharfboat secured by cables to the shore and connected to onshore utilities "was not practically capable of being used as a means of transportation"); *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995)(floating casino was no longer a vessel where it "was moored to the shore in a semi-permanent or indefinite manner"); *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625 (1887) (floating drydock, which during normal use would be sunk then raised up under a craft to lift it out of the water to be repaired, was a "fixed structure" that had been "permanently moored" to the mainland by chains and spars, rather than being a vessel that had been temporarily anchored), *Kathriner v. Unisea, Inc.*, 975 F.2d 657 (9th Cir. 1992) (former ship turned into floating fish processing plant not practicably capable of transportation over the water and thus no longer a vessel in navigation); *West v. United States*, 361 U.S. 118 (1959) and *Roper v. United States*, 368 U.S. 20 (1961) (mothballed Liberty ships not vessels in navigation where one was in midst of being transported to repair yard to be reactivated and the other was being used as a floating grain storage elevator). Respondents simply cannot distinguish those cases from the present one.

POINT IV THE *CAMMON* CASE IS GOOD LAW AS THE MARITIME BUT LOCAL DOCTRINE PROHIBITS FEDERAL MARITIME LAW PREEMPTION OF SAFETY REGULATIONS PROTECTING NEW YORK CONSTRUCTION WORKERS

Elliot asks this court to consider reviewing a prior case of the New York Court of Appeals, *Cammon v. City of New York*, 95 N.Y.2d 583 (2000), *rearg. denied*, 96 N.Y.2d 793 (2001). Obviously respondent in this matter has no right to such a review, and has not cross-appealed so that request must be denied. However, of note, the Astoria/Orion defendants concede the New York Court of Appeals "properly determined this case is distinguishable from *Cammon v. City of New York* (95 N.Y.2d 583 [2000], *rearg. denied*, 96 N.Y.2d 793 [2001])... inasmuch as Cammon involved a claim against a landowner rather than a vessel owner, and did not involve a § 905(b) claim." For those reasons alone the request for the court to consider analyzing the *Cammon* case should be outright denied.[3]

---

[3] New York's Labor Law claims are not equivalent to general maritime law unseaworthiness claims. They do place upon contractors and property owners non-delegable duties, the violation of which creates a cause of action for statutory violations analogous to that permitted by maritime law. *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958). Although Congress did away with the cause of action for unseaworthiness for those asserting vessel negligence claims, it did not prohibit claims for negligence

Mr. Lee asserts entitlement to benefit from New York's construction protection laws, because he was a construction worker working upon a land-based commercial enterprise. Respondents mis-rely on *Robins Dry Dock and Repair Co. v. Dahl*, 266 U.S. 449 (1925), which held that an injured worker doing repairs on a ship in navigation could not rely on a predecessor to New York Labor Law § 240 in issue here. As stated, the current case does not involve a vessel in navigation, and as such, injury claims on structures not constituting vessels in navigation are covered by state law. *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922).

Equally important the law has evolved from the time of *Rohde* that state substantive law often will apply to a claim arising out of an injury occurring on the navigable waters where state interests outweigh putative federal concerns. *See, Yamaha Motor Corporation v. Calhoun*, 516 U.S. 199 (1996) and *Jerome E. Grubart v. Great Lakes Dredge & Dock*, 513 U.S. 527 (1995), both of which informed the decision in *Cammon v. City of New York*, 95 N.Y.2d 583 (2000), which held that in maritime construction injury matters, New York's Labor Law was not preempted by federal maritime law, when the claim was against a landowner, recognizing that the "maritime but local" doctrine permits significant state regulation where matters of health and safety, traditional state areas of concern, are involved. This deferral is longstanding and significant. *See, e.g.*

---

based on other sources of non-delegable duties or negligence per se for violations of safety laws.

Cooley v. Board of Port Wardens, 53 U.S. (12 How.) 299 (1852), *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

POINT V THE NEW YORK COURTS WRONGLY REFUSED TO APPLY *SCINDIA* TO THE PETITIONER'S CLAIMS

When petitioner appealed the motion court's decision not to apply *Scindia*[4] to his negligence claim, the Appellate Division affirmed, as did the Court of Appeals. Neither court reviewed petitioner's claims in light of *Scindia's* rules. As a matter of maritime law, if the court finds LHWCA preempts the state law claims, this court should order the negligence claims be remanded for consideration as to the applicability of petitioner's *Scindia* based arguments.

As *Scindia* recognized, custom, practice and statutes could provide the duties to a maritime entity to intervene or act, but the New York courts ignored this court's ruling on the issue. Petitioner claims that he can rely on New York's Labor Laws to provide both the custom and statutory duty that was breached by the barge's owner. Thus, that portion of the decision should be remanded, if the court finds that a vessel in navigation was involved here.

---

[4] *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981).

CONCLUSION

For the reasons stated within the petition and in this reply brief, the Supreme Court should grant certiorari in this matter, and ultimately reverse the judgment of the New York Court of Appeals.

Respectfully submitted,

PAUL THOMAS HOFMANN
HOFMANN & SCHWEITZER
360 West 31st Street
New York, New York 10001
(212) 465-8840
paulhofmann@hofmannlawfirm.com

Counsel for Petitioner